UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MARK WAYNE SWANSON, Plaintiff, v. KING COUNTY CORRECTIONAL FACILITY, et al., Defendants.	CASE NO. C05-199 RSL REPORT AND RECOMMENDATION

Plaintiff Mark Wayne Swanson proceeding *pro se*, brings this civil rights action pursuant to 42 U.S.C. § 1983. Dkt. # 4. Now before the Court is defendants' motion for summary judgment. Dkt. # 28.

I. BACKGROUND

At the time this action was filed, plaintiff was in the King County Correctional Facility ("KCCF"). His action for lack of medical care received after his arrest and detention arose on July 15, 2004. Dkt. # 6 at 4. He alleges that he notified Officer Fowler explaining his medical emergency, making a request for a doctor. *Id.* Also, five additional officers, Smith, Young, Harvey, Brown and John Doe, on subsequent shifts denied his requests. *Id.* When he demanded to be seen by a doctor, Sgt. Lolly removed his clothing, bedding and toilet paper, along with threats to be "pepper-sprayed." *Id.* Seeking medical care on the average of ten times a day for fourteen

days, he was finally seen and his wrist placed in a cast. *Id*. at 5. On August 19, 2004, plaintiff was taken to Harborview Medical Center to be x-rayed whereupon he learned his bones were not healing properly, but that the remedy would require breaking the wrist again to reset the cast. *Id*. at 6.

II. STANDARD OF REVIEW

Summary judgment is appropriate when, viewing the evidence in the light most favorable to the nonmoving party, there exists "no genuine issue as to any material fact" such that "the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A material fact is a fact relevant to the outcome of the pending action. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Genuine issues of material fact are those for which the evidence is such that "a reasonable jury could return a verdict for the nonmoving party." *Id*. at 248.

In response to a properly supported summary judgment motion, the nonmoving party may not rest upon mere allegations or denials in the pleadings, but must set forth specific facts demonstrating a genuine issue of fact for trial and produce evidence sufficient to establish the existence of the elements essential to his case. *See* Fed. R. Civ. P. 56(e). A mere scintilla of evidence is insufficient to create a factual dispute. *See Anderson*, 477 U.S. at 252. In ruling on summary judgment, the court does not weigh evidence to determine the truth of the matter, but "only determine whether there is a genuine issue for trial." *Crane v. Conoco, Inc.*, 41 F.3d 547, 549 (9th Cir. 1994).

III. DISCUSSION

On April 28, 2005, Plaintiff lodged an Amended Complaint in this action pursuant to 28 U.S.C. § 1983. Dkt. # 6. On December 1, 2005, Defendants moved for Summary Judgment. Dkt. # 28. In light of the evidence produced by defendants in support of their summary judgment motion, the burden was on plaintiff to produce authenticated materials in opposition to the motion that "set forth specific facts

showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Plaintiff fails to satisfy that burden.

Under Local Rule CR 7(b)(2), plaintiff's failure to file an opposition may constitute an admission that defendant's motion has merit. Nevertheless, there is a line of Ninth Circuit cases, beginning with *Henry v. Gill Industries, Inc.*, 983 F.2d 943, 949-50 (9th Cir. 1993), which preclude a district court from granting a motion for summary judgment simply because the nonmoving party does not file opposing material, even if the failure to oppose violates a local rule. *Id.* at 950. However, when the local rule does not require, but merely permits the court to grant a motion for summary judgment, the district court has discretion to determine whether noncompliance should be deemed consent to the motion. *Id.* Thus, in the present case, reliance on Local Civil Rule 7(b)(2) is appropriate under *Gill* because plaintiff was warned in the Pretrial Scheduling Order (Dkt. #18) that his failure to file opposition to a summary judgment motion might be deemed an admission that the motion has merit, and may result in dismissal without a trial on the merits.[1] *See Bridges v. Lewis*, 18 F.3d 651, 652 (9th Cir. 1994).

// // //

[1] Plaintiff filed a Freedom of Information Act Request for information contained in his Immigration file on August 9, 2005. A minute order denying this request was mailed to the plaintiff and returned as undeliverable after three attempts. Dkts. #21, 22, 23. Plaintiff has made no other submissions to the court. Six months after the defendants' motion for summary judgment and final disposition of this case, Plaintiff has not responded.

Moreover, an independent review of the record reveals an absence of genuine, material issues of disputed fact. As Defendants argue, sustaining a §1983 action based upon a lack of medical care requires a showing of deliberate indifference. *Hudson v. McMillian*, 503 U.S. 1,5 (1992). Absent medical documentation to support Plaintiff's contentions (Dkt. # 6 at 5), summary judgment is appropriate and is recommended.

DATED this 31st day of May, 2006.

MONICA J. BENTON
United States Magistrate Judge